No. 17-130

In The
Supreme Court of the United States

RAYMOND J. LUCIA AND
RAYMOND J. LUCIA COMPANIES, INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF OF SHOW, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

SHOW, Inc. is an affiliate of the Tennessee Walking Horse National Celebration, which annually sponsors the premier walking horse competition. To eliminate cheating in such events, in 1970, Congress passed the Horse Protection Act, 15 U.S.C. §§1821-1831. The Department of Agriculture administers the HPA, and certifies SHOW to license inspectors to examine horses for compliance with USDA regulations. USDA inspectors attend some events and also inspect horses for compliance. If an inspector is of the opinion a horse is non-compliant, management is informed, and the horse is disqualified.

The USDA can seek administrative penalties against persons it alleges violated the HPA. The HPA mandates:

> No civil penalty shall be assessed unless such person is given notice and an opportunity for a hearing before the Secretary with respect to such violations. The amount of such civil penalty shall be assessed by the Secretary by written order.

15 U.S.C. §1825(b)(1). USDA administrative law judges adjudicate enforcement proceedings, issuing an initial decision. Any party can appeal the ALJ's decision to

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[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part. No person other than *amicus*, its counsel and FAST (Foundation for the Advancement and Support of the Tennessee Walking Show Horse) made a monetary contribution to its preparation or submission. Counsel for the parties filed blanket consents to the filing of *amicus* briefs.

the USDA's Judicial Officer, a Senior Level employee to whom the Secretary has delegated the authority to make final decisions. 7 C.F.R. §2.35.

USDA ALJs, like SEC ALJs, exercise significant authority, but are not appointed as inferior officers by the Secretary. The Judicial Officer, who makes the final decision of the Department, is not appointed as a principal officer. No HPA civil penalty has ever been assessed by a lawfully appointed inferior officer or principal officer. SHOW has an interest in ensuring that the power to preside over and decide enforcement proceedings is vested in officials who are lawfully appointed.

SUMMARY OF ARGUMENT

The government concedes that SEC ALJs are inferior officers but does not address what caused the D.C. Circuit to reach a contrary conclusion. This case is before this Court because the D.C. Circuit wrongly interpreted *Freytag v. C.I.R.*, 501 U.S. 868 (1991) as holding that the Tax Court's special trial judges were inferior officers because they made final decisions that were not subject to review by a superior officer. The court then reviewed the statute and rules governing proceedings before SEC ALJs, and concluded the ALJ initial decisions were subject to discretionary review by the Commission before they became final. Lacking final decision making authority, SEC ALJs were employees, not officers.

The court did not review the relevant Tax Code provisions or Tax Court Rules that also provide that STJ decisions are subject to review by Tax Court judges. Further, since the Tax Court is a court of law, and not a part of the executive, STJ decisions are subject to discretionary review by judges on the courts of appeals, principal officers who serve in the same branch as STJs. Nor did the D.C. Circuit discuss the Appointments Clause decisions *Freytag* cited, which held that STJs were inferior officers, as opposed to principal officers, because STJ decisions were subject to review by Tax Court judges. *Freytag* did not hold that STJs made final decisions that were not subject to review by a superior officer. Finally, in brushing aside the petitioners' reliance on *Edmond v. U.S.*, 520 U.S. 651 (1997), the D.C. Circuit failed to recognize that if Tax Court STJs made final decisions that were not subject to review by any superior officer, then STJs would have to be appointed as principal officers.

This Court should reject the D.C. Circuit's holding that final-decision-making-authority is a necessary characteristic of judges who function as inferior officers, and reaffirm that judges who make final decisions that are not subject to review by a superior officer in the same branch must be appointed by the President with the advice and consent of the Senate.

ARGUMENT

I. CONFLICTING INTERPRETATIONS OF *FREYTAG*.

Freytag v. C.I.R. held that Tax Court special trial judges were inferior officers of the United States who were properly appointed by the Chief Judge of a court of law. When deciding whether FDIC ALJs were officers, in *Landry v. FDIC*, 204 F.3d 1125, 1132 (D.C. Cir. 2000), the D.C. Circuit found the "line between 'mere' employees and inferior officers anything but bright." The court considered *Freytag* "the most analogous case," but held that ALJs were distinguishable from STJs because the "authority of STJs [is] not matched by ALJs here." *Id.* at 1133. According to the D.C. Circuit, STJs had "the authority to render the *final* decision of the Tax Court in declaratory judgment proceedings and in certain small-amount tax cases," while the "ALJs here can never render the decision of the FDIC." *Id.* (emphasis in original). While acknowledging that "[i]t is, to be sure, uncertain just what role the STJs' power to make final decisions played in *Freytag*," the D.C. Circuit believed "the STJs' power of final decision in certain classes of cases was critical to the Court's decision." *Id.* at 1133, 1134.

In *Burgess v. FDIC*, 871 F.3d 297, 300 (5th Cir. 2017), in addressing whether FDIC ALJs were officers, the Fifth Circuit recognized that the *Landry* "court read *Freytag* as holding that a government worker must have final decision-making authority to be considered an Officer." The *Burgess* court concluded that

Freytag held that the STJs' significant duties brought them under the Appointments Clause and that "[t]he Court's additional statement – that these duties and discretion, coupled with the power to enter final judgments also makes the STJs Officers – was dicta or an alternative basis for its decision." *Id.* at 301.

In deciding whether SEC ALJs were officers, in *Lucia v. SEC*, 832 F.3d 277, 285 (D.C. Cir. 2016), the panel recognized "*Landry* is the law of the circuit," and concluded that since "no initial decision of its ALJs is independently final," SEC ALJs are not officers. *Id.* at 287. Moreover, the *Lucia* panel rejected the petitioners' reliance on *Edmond v. United States*, 520 U.S. 651 (1997), in contending that the ability to render a final decision characterized principal officers, stating that *Edmond* "had no occasion to address the differences between employees and Officers." *Id.* at 285.

By assuming that STJs were inferior officers because of their "ability to 'render a final decision on behalf of the United States,'" the D.C. Circuit's constitutional "analysis begins, and ends," with "whether Commission ALJs issue final decisions of the Commission." *Id.* The court ignored the contradiction in its own argument: if STJs made final decisions, then STJs would have to be appointed as principal officers, since the authority to make final decisions that are not subject to review by a superior officer is the defining feature of judges who are principal officers.

Bandimere v. SEC, 844 F.3d 1168, 1174, 1179 (10th Cir. 2016), held that "*Freytag* controls the result

of this case," and "SEC ALJs are inferior officers under the Appointments Clause." The court rejected the SEC's argument that "ALJs are not inferior officers because they cannot render final decisions." *Id.* at 1182. The *Bandimere* majority disagreed with *Landry*'s and *Lucia*'s interpretation of *Freytag* "that final decision-making power is dispositive. . . ." *Id.* at 1182. In addressing *Edmond*, the court stated that "the Supreme Court considered final decisionmaking power as relevant to the difference between principal and inferior officers, not the difference between an officer and an employee." *Id.* at 1184.

These conflicting decisions arise from the D.C. Circuit distinguishing FDIC and SEC ALJs from Tax Court STJs on the premise that the STJs make final decisions, while ALJs do not. This premise is not supported by the Tax Code, Tax Court Rules or Tax Court's procedures, which provide that STJ decisions in small tax, limited-tax and declaratory judgment cases are subject to discretionary review by Tax Court judges before the decisions are entered as decisions of the court.

II. STJ DECISIONS ARE SUBJECT TO REVIEW BY TAX COURT JUDGES.

The procedures of the Tax Court differ markedly from the procedures of administrative agencies. *Freytag* held that the Tax Court, for the purpose of the Appointments Clause, was a court of law, independent of the executive, and its Chief Judge was authorized to

appoint STJs. 501 U.S. at 891. The Tax Court, as a court of law, is not subject to the Administrative Procedures Act. 5 U.S.C. §551(1)(B). The FDIC and SEC are agencies subject to the Administrative Procedures Act, specifically the two-tier appeal provision in §557(b). The D.C. Circuit's failure to appreciate the procedures utilized by the Tax Court contributed to its mistaken assumption that STJs made final decisions not subject to review by Tax Court judges.

A. The FDIC and SEC Employ a Two-Tier Review Procedure.

The Administrative Procedures Act provides that an ALJ "who presides at the reception of the evidence . . . shall make the recommended decision or initial decision required by section 557 of this title. . . ." 5 U.S.C. §554(d). In FDIC proceedings, an ALJ will "issue a decision" recommending proposed findings and a proposed order, file it with the Executive Secretary, and serve the parties. Within 30 days, the respondent can file exceptions to the recommended decision, and the record will be "forwarded to the Board of Directors for final decision." *Landry*, 204 F.3d at 1128. The Board's decision is final for purposes of appeal to a court of appeals.

SEC ALJs render initial decisions. 5 U.S.C. §557(b). SEC rules require the record be certified to the Commission for discretionary review, either on the Commission's own initiative or if an appeal is filed. If Commission review is not timely sought, or the

Commission declines to exercise its discretionary right of review, the ALJ's decision will "be deemed the action of the Commission." *Lucia*, 832 F.3d at 281-82. Notice is then given by the Office of General Counsel "that the initial decision of the administrative law judge has become the final decision of the Commission" and "is hereby effective."[2] If a timely appeal to the Commission is filed, and review granted, the Commission's decision is final for purposes of appeal.

The two-tier appeal system, required by the APA, is the source of the current Appointments Clause controversy. The two-tier system creates an appearance that ALJs act independent from their employer, by denying the Department Head the authority to appoint or fire ALJs. Hence the problem: if the Department Head cannot appoint ALJs, and ALJs exercise the significant authority of an officer, then their appointment violates the Appointments Clause.

B. The Tax Court Abolished the Two-Tier Appeal Procedure.

Commencing in 1944, the Presiding Judge of the Tax Court could appoint an attorney from the legal staff to conduct "the hearing in accordance with the Court's rules of practice," who "shall prepare and submit to the Court or a Division thereof a report of his findings of fact . . . and copies thereof shall be served

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[2] *In the Matter of Neologic Animation, Inc.*, Admin. Proc. File No. 3-16595 (2015), which can be found on the SEC website at https://www.sec.gov/litigation/apdocuments/apclosed-fileno-asc.xml.

upon both parties."[3] Thereafter, the parties "may file exceptions thereto which will be considered by the Division to which the case is assigned."[4] Initially, the Tax Court operated under a two-tier appeal and review system.

In 1969, the Tax Court "established a small tax division under the supervision of a judge of the court."[5]

> The majority of the cases were assigned to STJs for hearing and the preparation of summary findings of fact and opinion. The report of the special trial judge is then submitted to the chief judge, or if the chief judge so directs, to a judge or division of the court for review.[6]

T.C. Rule 177 (1984) provided: "Neither briefs nor oral argument will be required in small tax cases." Small tax cases did not provide for taking exceptions or filing appeals to the Tax Court judges.

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[3] Tax Court Rule 48 (1944), found in the Brief for the Respondent, *Ballard v. C.I.R.*, 544 U.S. 40 (2005) (Nos. 03-184 and 03-1034), 2004 WL 2336550 at *6a-*7a (cited hereafter as "C.I.R. Brief at *___").

[4] *Id.*

[5] H. Dubroff & B. J. Hellwig, *The United States Tax Court: An Historical Analysis*, 828 (Government Publishing Office, 2d ed. 2014). The 1979 original edition resulted from the Tax Court granting Professor Dubroff permission to prepare a comprehensive history of the Court. The history was periodically updated in articles in the Albany Law Review. In 2010, the Court concluded that a comprehensive update should be prepared, resulting in the 2014 second edition. *Id.* at Preface, pages i-iv.

[6] *Id.* at 829.

In 1976, the Tax Court exempted declaratory judgment and limited-amount tax cases from the objection and appeal procedure, making them like small tax cases.[7] The purpose was "to make changes in the present practices of the Court in order to dispose of pending cases more promptly and efficiently."[8] When the two-tier appeal procedure was eliminated for limited-amount cases, the Chief Judge issued United States Tax Court General Order No. 5, at 1 (1976), requiring that:

> As soon as practicable after hearing a case assigned to him in accordance with this order, a Special Trial Judge shall prepare his proposed findings of fact and opinion and submit them to the Chief Judge, or another Judge designated by him for that purpose. The proposed findings of fact and opinion of the Special Trial Judge shall not constitute the findings of fact and opinion of the Court unless reviewed and adopted by the Judge to whom the case is assigned, and the report is approved by the Chief Judge.[9]

In 1983, the Tax Court amended Rule 182, replacing it with Rule 183 (1984), governing a STJ's report in cases assigned under §7443A(b)(4). The STJ's decision would no longer be filed and served on the parties; it was submitted to the Chief Judge. As a result, by

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[7] C.I.R. Brief, *supra* n. 3, at *36.

[8] *Id.* at *8a.

[9] *Id.* at *8a-*10a.

1983, "the procedures for service of the reports of special trial judges were completely eliminated."[10]

The elimination to the two-tier exception and appeal procedure was noted in *Freytag*. In *Freytag v. C.I.R.*, 904 F.2d 1011, 1015, n. 8 (5th Cir. 1990), the court observed that previously "litigants were furnished with a copy of the special trial judge's proposed opinion and filed exceptions thereto," but "litigants are no longer afforded this opportunity, [and] this change in rules, in our view, confirms that the Tax Court's relationship with its special trial judges cannot be analogized to typical appellate review." This Court's decision in *Freytag* noted that the Chief Judge received the STJ's report on October 21, 1987, and adopted it that same day. 501 U.S. at 872, n. 2. While acknowledging that the "Chief Judge had a duty to review the work of the Special Trial Judge," the Court pointed out that the STJ had submitted a report to the Chief Judge four months before, thus, "the chronology does not appear to us to be at all significant." *Id.*

C. The Tax Court Employs a Deliberative Procedure.

In place of the two-tier appeal procedure, the Tax Court employed a deliberative procedure under which the Tax Court judges reviewed reports of judges and STJs before they were entered as decisions of the court.

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[10] H. Dubroff and C. Greene, *Recent Developments in the Business and Procedures of the United States Tax Court*, 52 Albany L. Rev. 33, 64 (1987).

In cases assigned under §7443A(b)(1)-(3), STJs' proposed decisions are not final independent of review by Tax Court's judges. The STJs' authority is limited by the Tax Court "Rules and such directions as may be prescribed by the Chief Judge." T.C. Rule 180 (1984). STJs are "[s]ubject to the specifications and limitations in the order designating a Special Trial Judge and in accordance with the applicable provisions of these Rules." T.C. Rule 181 (1984). Congress authorized the Tax Court judges to supervise STJs who would make the decision of the court by making the STJs "subject to such conditions and review as the court may provide." I.R.C. §7443A(c) (1986).

The Tax Court's supervision of STJ decision-making is driven by the goal to speak with one voice in the court's decisions. Since 1927, the Tax Court has employed a conference procedure to review the judges' reports.[11] The conference review "process has been shaped by the court's desire to provide an impartial and expedient judicial review of tax controversies that will serve as a source of uniform precedents for the Service and the public."[12] Under the conference procedure, a judge's findings of fact and opinion in a case are included in a report that is submitted to the Chief Judge.

In 1982, except in declaratory judgment cases, Congress provided the report could be stated orally in the transcript as a bench opinion if the judge was "satisfied as to the factual conclusions to be reached in the

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[11] Dubroff, n. 5 at 735, n. 62.

[12] *Id.* at 729.

case and that the law to be applied thereto is clear."[13] Bench opinions are transcribed, and the Chief Judge "requested that the transcript of cases in which bench opinions were rendered be forwarded to him, or in small tax cases, to the judge in charge of the small tax division."[14] I.R.C. §7459(a) and (b) (1982) ("The decision shall be made by a judge in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.").

Uniformity in Tax Court decisions is accomplished because:

> The report (opinion or memorandum opinion) is transmitted to the chief judge who, with the assistance of the legal staff, reviews the opinion, notes any comments or suggested revisions, and decides whether to direct that the opinion be reviewed by the Court Conference. Summary opinions authored by special trial judges undergo a similar review by a Presidentially appointed judge assigned to the Small Tax Case Division.[15]

This Court observed in *Ballard* that the Tax Court operated under "a novel practice regarding the report the special trial judge submits post-trial to the Chief Judge." 544 U.S. at 56. In *Ballard*, the Commissioner defended this deliberative procedure,[16] arguing there

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[13] *Id.* at 740.

[14] *Id.* at 749.

[15] *Id.* at 735.

[16] C.I.R. Brief, *supra*, n. 3, at *8.

is no legal prohibition against judges exchanging ideas.[17] Where multiple judges participate in making the decision, that decision is not final until it is released, and "nothing precludes such interchange between the STJ and a Tax Court judge."[18]

D. The Tax Code, Tax Court Rules and Orders Authorize Tax Court Judges to Review STJ Decisions Prior to their Entry as the Decision of the Court.

In cases the Chief Judge assigns to STJs under §7443A(b)(1)-(4), the Tax Code, Tax Court Rules and Orders make STJ decisions subject to review by Tax Court judges prior to their being entered as decisions of the court.

1. STJ declaratory judgment decisions are subject to review.

I.R.C. §7443A(b)(1) (1984) authorizes the Chief Judge to assign "any declaratory judgement proceeding" to an STJ and §7443A(c) provides that the "court may authorize a special trial judge to make the decision of the court . . . subject to such conditions and review as the court may provide." T.C. Rule 180 (1984) required that the STJ's adjudicative activities be "in accordance with these Rules and such direction as may be prescribed by the Chief Judge." T.C. Rule 181 (1984)

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[17] *Id.* at *20.

[18] *Id.* at *21.

made the STJ's powers and duties "[s]ubject to the specifications and limitations in the order . . . and in accordance with the applicable provisions of these Rules. . . ."

Decisions in declaratory judgment cases would "ordinarily be made on the basis of the administrative record" compiled before the Internal Revenue Service. T.C. Rule 217(a) (1984). T.C. Rule 152, authorizing bench opinions, did not apply to declaratory judgment cases. T.C. Rule 218(a) (1984) provided that in declaratory judgment cases, where the STJ

> is authorized in the order of assignment to make the decision, the opinion of the Special Trial Judge and his proposed decision shall be submitted to and approved by the Chief Judge or by another Judge designated by the Chief Judge for that purpose, prior to service of the opinion and decision upon the parties.

The STJ's proposed decision in a declaratory judgment case is subject to review by the Chief Judge, or a designated judge, and "frequent consultation between judges is the rule, rather than the exception."[19] Only after the proposed decision was submitted to the Chief Judge would the STJ's decision become the decision of the court.

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[19] Dubroff, *supra* n. 5 at 759.

2. STJ decisions in small tax cases are subject to review.

When *Freytag* was decided, small tax cases involved disputes under $10,000 where the taxpayer elected to proceed under the informal procedures authorized by I.R.C. §7463 (1984) and T.C. Rules 170-179 (1984). I.R.C. §7443A(b)(2) (1984) authorized the Chief Judge to assign small tax cases to an STJ, who would preside over the case "in accordance with these Rules and such direction as may be prescribed by the Chief Judge." T.C. Rule 180 (1984). I.R.C. §7443A(c) (1984) provided that the "court may authorize a special trial judge to make a decision of the court" in a small tax case "subject to such conditions and review as the court may provide."

Unless a bench opinion had already been dictated into the transcript, T.C. Rule 182(a) (1984) required that the STJ

> who conducts the trial of a small tax case, shall, as soon after such trial as shall be practicable, prepare a summary of the facts and reasons for his proposed disposition of the case, which shall then be submitted promptly to the Chief Judge, or, if the Chief Judge shall so direct, to a Judge or Division of the Court.

In small tax cases, STJ decisions were subject to discretionary review before they were entered as the decision of the court and were "subject to such conditions and review as the Chief Judge may provide." T.C. Rule 182(c) (1984). STJs, even in small tax cases

assigned under §7443A(b)(2), were subject to supervision by Tax Court judges appointed as principal officers, and the STJs' proposed decisions were "subject to such conditions and review as the court may provide." I.R.C. §7443A(c).

3. STJ decisions in limited-amount cases are subject to review.

In a limited-amount case, not exceeding $10,000, where the taxpayer did not elect to proceed as a small tax case, I.R.C. §7443A(b)(3) permitted the Chief Judge to assign the case to an STJ, who would preside over the case "in accordance with Rules and such direction as may be prescribed by the Chief Judge." T.C. Rule 180 (1984). I.R.C. §7443A(c) (1984) provided that the "court may authorize a special trial judge to make a decision of the court" in a limited-amount tax case "subject to such conditions and review as the court may provide."

Unless a bench opinion had already been dictated into the transcript, T.C. Rule 182(b) (1984) required that

> a Special Trial Judge who conducts the trial of a case (other than a small tax case) where neither the amount of the deficiency placed in dispute (within the meaning of Code Section 7463), nor the amount of any claimed overpayments, exceeds $10,000 shall, as soon after such trial as shall be practicable, prepare proposed findings of fact and opinion, which shall then be submitted promptly to the Chief Judge.

The Chief Judge, in a 1976 Order, required that:

> The proposed findings of fact and opinion of the Special Trial Judge shall not constitute the findings of fact and opinion of the Court unless reviewed by the Judge to whom the case is assigned, and the report is approved by the Chief Judge.[20]

STJs, even in limited-amount tax cases assigned under §7443A(b)(3), are subject to supervision by Tax Court judges appointed as principal officers.

4. STJ decisions in "any other proceeding" are subject to review.

I.R.C. §7443A(b)(4) authorized the Chief Judge to assign "any other proceeding" to a STJ, but §7443A(c) did not authorize the STJ to "make the decision of the court." T.C. Rule 183 (1984) provided that after the trial, and all briefs had been submitted, "the Special Trial Judge shall submit his report, including his findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Division of the Court." The report was not filed or served, so there was no two-tier appeal procedure. The judge to whom the case was referred could adopt, modify or reject the report, while giving due regard to the STJ's findings of fact, which were presumed correct. T.C. Rule 183(c) (1984).

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[20] C.I.R. Brief, *supra* n. 3 at *10a.

In *Ballard*, this Court decided that Tax Court Rule 183 required that the STJ's report be a part of the court's records in cases assigned under §7443A(b)(4). To address the *Ballard* decision, in 2005, Tax Court Rule 183 was amended, requiring the STJ's report be filed and served, giving the parties an opportunity to file objections. However, the Tax Court's Rules in effect in 1990, and today, governing small tax, limited-amount and declaratory judgment cases, were not changed, and the STJ's proposed decision becomes the decision of the court under the collaborative-decision system the Commissioner described and defended in *Ballard*. Consequently, no STJ's proposed decision ever becomes the decision of the court independent of review by a Tax Court judge.

III. STJ DECISIONS ARE SUBJECT TO REVIEW BY JUDGES IN SUPERIOR COURTS OF LAW.

In *Freytag*, the divisive issue was not whether STJs were employees or officers, but whether the Tax Court was a court of law or part of the executive. This Court held the Tax Court was an Article I court that "exercises judicial, rather than executive, legislative, or administrative power" and "remains independent of the Executive and Legislative Branches." 501 U.S. at 890-91. Four Justices, while concurring in the judgment, contended the Tax Court was in the executive, because if the Tax Court was a court of law, this raised a separation of powers issue since the President could remove a judge for cause.

The separation of powers issue arose in *Kuretski v. C.I.R.*, 755 F.3d 929 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2309 (2015). The D.C. Circuit rejected *Freytag*'s holding that the Tax Court was a court of law, deciding that it was an Article I court within the executive branch. In response, in 2015, Congress amended I.R.C. §7441 to reflect that "[t]he Tax Court is not an agency of, and shall be independent of, the executive branch of the Government."

Battat v. C.I.R., 148 T.C. No. 2 (2017), reaffirmed the Tax Court's status as a court of law, pointing out that Tax Court judges exercise judicial power to the exclusion of any other function and resemble federal district courts whose judgments are appealable only to regional U.S. courts of appeals and are reviewable under the standards of district court bench trials as opposed to review of agencies' decisions under APA §706(2)(A). Special trial judges resemble magistrate judges. *See Battat*, 148 T.C. No. 2 at 1-11.

STJs' decisions, when entered as decisions of the court, are final decisions of a court of law for purposes of appeal, and, unless an appeal is waived, are reviewable by judges of United States courts of appeals. I.R.C. §7481. Because the Tax Court is a court of law, there is a second level of discretionary review of STJ decisions by principal officers in the same branch. In small tax cases, filed under §7463 and T.C. Rules 170-178, the taxpayer waives the right to appeal to an Article III court. *See Cole v. C.I.R.*, 958 F.2d 288, 289 (9th Cir. 1992). In limited-amount cases, the decision of the STJ, when entered, is the decision of the court for purposes

of appeal. *See Crawford v. C.I.R.*, 266 F.3d 1120, 1123 (9th Cir. 2001). STJ declaratory judgment decisions are reviewable in United States courts of appeals. I.R.C. §7481(a)(1), *Carter v. C.I.R.*, 746 F.3d 318, 321 (7th Cir. 2014).

Tax Court STJs are officers, not employees, because they exercise significant authority. They are inferior officers because their decisions are subject to review by Tax Court judges and courts of appeals judges, superior principal officers in the same branch.

IV. *FREYTAG* DOES NOT HOLD THAT STJS MAKE DECISIONS INDEPENDENT OF DISCRETIONARY REVIEW BY TAX COURT JUDGES.

In *Freytag*, the C.I.R. conceded that STJs were inferior officers in three types of cases because they could "render the decisions of the Tax Court." 501 U.S. at 882. The authority to render the decision of the court means that the STJ decision is final for purposes of appeal to an Article III court, not that the decision was unreviewable by a Tax Court judge. I.R.C. §7481. The authority to make the "decision of the court" does not equate with the authority to make a decision that is not subject to review by a principal officer. This was the conclusion in the two cases this Court cited in *Freytag*, which held that because of their significant authority, STJs were officers as opposed to employees, but were inferior officers, as opposed to principal officers,

because the STJs' decisions were subject to review by Tax Court judges.

Freytag, filed in March 1982, was one of nine consolidated test cases arising from a tax shelter scheme promoted by First Western and Samuels, Kramer. The test cases were initially assigned to Tax Court judge Wilbur. Trial commenced in 1984, but, when Judge Wilbur became ill, the cases were assigned to STJ Powell to "preside over the trial as an evidentiary referee." 501 U.S. at 871. After Judge Wilbur retired, the Chief Judge assigned the cases to STJ Powell for "preparation of written findings and an opinion." *Id.* STJ Powell submitted his "proposed findings and opinion" on October 21, 1987, which the Chief Judge promptly adopted as the decision of the court. *Id.* at 872, n. 2.

"Pursuant to section 7443A and Rules 180, 181 and 182," the petitions in *First Western Govt. Securities, Inc. v. Commissioner*, 94 T.C. 549, 552 (1990) and *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975 (2d Cir. 1991), *cert. denied*, 502 U.S. 957 (1991), were also assigned to STJ Powell. After the test-cases decision, but before their cases were tried, the petitioners filed motions to vacate the assignment, requesting their cases be "assigned to a Presidentially appointed Tax Court judge." *First Western*, 94 T.C. at 549.

In response, the C.I.R. contended that since an STJ assigned under §7443A(b)(4) could not make the decision of the court, the STJ functioned as an employee, not an officer. The Tax Court rejected this position, concluding that because STJs "may be assigned

any case and may enter decisions in certain cases, it follows that special trial judges exercise significant authority" and "are officers, not employees of the United States." *Id.* at 557.

The Tax Court then addressed whether STJs were inferior or principal officers. Relying on *Morrison v. Olsen*, 487 U.S. 654 (1988), the court acknowledged the "line between inferior and principal officer is one that is far from clear," but concluded STJs were inferior officers, "[c]onsidering the limitations placed on the duties, jurisdiction and tenure of special trial judges." *Id.* at 558-59. Among those limitations, "[t]he chief judge of the Tax Court, a principal officer, has the authority to appoint and remove special trial judges without restriction" and "[t]he duties of special trial judges are defined and limited by the Order issued by the chief judge assigning a case to a special trial judge." *First Western*, 94 T.C. at 558 (citing Tax Court Rules 180, 181, 182 and 183).

In *Samuels, Kramer*, an interim appeal of the Tax Court's *First Western* decision, the Second Circuit first disposed of the taxpayer's argument that the STJ functioned as a principal officer. STJs were not principal officers, because "[s]pecial trial judges can be removed at any time by the Chief Judge" and the "Chief Judge also has absolute control over the extent of the duties that are assigned to special trial judges." *Id.* at 985. In rejecting the C.I.R.'s argument that an STJ assigned under §7443A(b)(4) was not an officer because the STJ could not make the decision of the court, the court held that although "the ultimate decisional authority in

cases under section 7443A(b)(4) rests with the Tax Court judges, the special trial judges do exercise a great deal of authority in such cases" and STJs are "more than mere aids to the judges of the Tax Court." *Id.* at 985-86.

In *First Western* and *Samuels, Kramer*, the courts recognized that all cases assigned to STJs were subject to review by Tax Court judges. This is required by I.R.C. §7443A(a) and (c), under which STJs are appointed by and serve at the discretion of the Chief Judge who "may authorize" the STJ to "make the decision of the court . . . subject to such conditions and review as the court may provide." The D.C. Circuit, in *Landry* and *Lucia*, did not discuss the "conditions and review" STJ decisions were subject to in declaratory judgment, small tax and limited-amount cases.

V. JUDGES WHO MAKE FINAL DECISIONS FUNCTION AS PRINCIPAL OFFICERS.

If STJs' decisions are independent of discretionary review by a principal officer, as *Landry* and *Lucia* assume, then, under this Court's post-*Freytag* Appointments Clause decisions involving judges, STJs would have to be appointed as principal officers. If *Landry* and *Lucia* are correct, then *Freytag*'s holding that STJs are inferior officers is incorrect.

Weiss v. U.S., 510 U.S. 163, 170 (1994), upheld the appointment of the judges on the Navy-Marine Corps Court of Military Review because each of the military judges had been appointed as a commissioned officer

by the President. Justice Souter concurred, with the understanding that the judges were inferior officers "because not only the legal rulings of military judges but also their fact finding and sentencing are subject to *de novo* scrutiny by the Courts of Military Review." *Id.* at 193.

The petitioners, in *Ryder v. U.S.*, 515 U.S. 177 (1995), complained that two civilian judges' appointments on the United States Coast Guard Court of Military Review by a General Counsel contravened the Appointments Clause requirement that officers be appointed by the Department Head. This Court agreed, concluding that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation occurred." *Id.* at 182-83.

In *Edmond v. U.S.*, 520 U.S. 651 (1997), the Secretary of Transportation had appointed the two civilian judges on the renamed Coast Guard Court of Criminal Appeals. The petitioner contended the judges held "principal-officer status" because of "the importance of the responsibilities that Court of Appeals judges bear." *Id.* at 662. Citing *Freytag*, this Court noted "[t]his, however, is also true of offices that we have held 'inferior' within the meaning of the Appointments Clause," thus, the "exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and nonofficer." *Id.*

The Court announced a "definitive test" for determining whether a judge functions as an inferior or principal officer:

> Whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally hold a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who are appointed by Presidential nomination with the advice and consent of the Senate.

Id. at 662-63. The judges in *Edmond* were officers because of the significance of their authority. They were inferior officers because their decisions were subject to discretionary review by judges with the power to reverse those decisions, who were principal officers on Court of Appeals for the Armed Forces, a court in the Department of Defense, and, like the Department of Transportation, in the executive branch. The judges in *Edmond* were inferior officers because "[w]hat is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 664.

Like the judges in *Edmond*, STJs are officers because of the significant authority they exercise. STJs are inferior officers, as distinguished from principal officers; they have no power to render a final decision on behalf of the United States unless permitted to do so by judges in courts of law who are principal officers.

CONCLUSION

In its Brief for Respondent, at page 14, the government describes *Freytag* as holding that STJs are inferior officers since "special trial judges are also authorized by law to 'render the decisions of the Tax Court [i.e., final decisions] in declaratory judgment proceedings and limited-amount tax cases.'" There would be no need to insert "[final decision]" in the quote if this Court had said "final decision," which it did not. *Freytag* did not hold STJs make final decisions, if, by that, one means decisions that are independent of review by a superior principal officer.

The Brief for Respondent, at pages 10-11, states: "Upon further consideration, and in light of the implications for the exercise of executive power under Article II, the government is now of the view that such ALJs are officers given that they exercise 'significant authority pursuant to the laws of the United States.'" The government suggests that the question of ALJs' status "is also extremely important because it affects . . . the conduct of adversarial administrative proceedings in other agencies within the government," *id.* at

10, specifically identifying the Department of Agriculture, *id.* at 26. This Court's decision will be relevant to the interest of this *amicus*, since in USDA administrative proceedings, not only is the status of ALJs important, so is the status of the Judicial Officer, a Senior Level employee whose decisions are not subject to review by a principal officer in the executive branch.

This Court should remedy the confusion caused by *Landry* and *Lucia* by following *Freytag* and *Edmond*. SEC ALJs are officers because of the significant authority they exercise, and they are inferior officers because their work is directed and supervised by duly appointed principal officers in the same branch.

Respectfully submitted,

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